(2)

No. 09-1285

In the Supreme Court of the United States

TED L. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence obtained during a warrant search of petitioner's residence is admissible under the good-faith exception to the exclusionary rule.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 7

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 7

Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 7

Massachusetts v. *Sheppard*, 468 U.S. 981 (1984) 12

United States v. *Brown*, 951 F.2d 999 (9th Cir. 1991) 13

United States v. *Bynum*, 293 F.3d 192 (4th Cir. 2002) ... 12

United States v. *Gourde*:

382 F.3d 1003 (9th Cir. 2004) 13

440 F.3d 1065 (9th Cir.), cert. denied, 549 U.S. 1032 (2006) 11, 13

United States v. *Hallam*, 407 F.3d 942 (8th Cir. 2005) .. 13

United States v. *Johnson*, 78 F.3d 1258 (8th Cir.), cert. denied, 519 U.S. 889 (1996) 13

United States v. *Kelley*, 482 F.3d 1047 (9th Cir. 2007), cert. denied, 552 U.S. 1104 (2008) 11

United States v. *Leon*, 468 U.S. 897 (1984) 4, 8, 9, 12

Cases--Continued: Page

United States v. *Mendonsa*, 989 F.2d 366 (9th Cir. 1993) 13
United States v. *Prideaux-Wentz*, 543 F.3d 954 (7th Cir. 2007) 10, 14
United States v. *Rice*, 358 F.3d 1268 (10th Cir. 2004), vacated on other grounds, 543 U.S. 1103 (2005) 10
United States v. *Romm*, 455 F.3d 990 (9th Cir. 2006), cert. denied, 549 U.S. 1150 (2007) 11
United States v. *Stulock*, 308 F.3d 922 (8th Cir. 2002) ... 11
United States v. *Taxacher*, 902 F.2d 867 (11th Cir. 1990), cert. denied, 499 U.S. 919 (1991) 13
United States v. *Wagers*, 452 F.3d 534 (6th Cir.), cert. denied, 549 U.S. 1032 (2006) 11
United States v. *Weber*, 923 F.2d 1338 (9th Cir. 1990) ... 10
United States v. *Williams*, 504 U.S. 36 (1992) 10
United States v. *Zimmerman*, 277 F.3d 426 (3d Cir. 2002) 13
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 7

Constitution and statute:

U.S. Const. Amend. IV 4
18 U.S.C. 2252(a)(4)(B) 2, 3

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 592 F.3d 799. The report and recommendation of the magistrate judge (Pet. App. 35-56) and the district court's order adopting that report and recommendation (Pet. App. 21-34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2010. The petition for a writ of certiorari was filed on April 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Eastern District of Wisconsin indicted petitioner on two counts of possessing visual depictions of minors engaging in sexually explicit

conduct, in violation of 18 U.S.C. 2252(a)(4)(B). The district court granted petitioner's pre-trial motion to suppress evidence seized during a warrant-authorized search of his home and statements he made during the search. Pet. App. 21-34. On the government's interlocutory appeal, the court of appeals reversed and remanded. *Id.* at 1-11.

1. In May 2005, law enforcement agents in San Diego, California, executed a warrant to search Michael Golubski's account with America Online (AOL), an Internet service provider. Pet. App. 2. The search revealed that, between April 5 and May 1, 2005, Golubski sent 17 messages, including 11 that contained child pornography, to "longtalks@aol.com." *Id.* at 2, 72. Records later obtained from AOL showed that petitioner used longtalks@aol.com as his email address until June 28, 2005; that petitioner then changed his email address to TedP5785@aol.com and continued to use that account through at least November 2006; and that petitioner resided in Wauwatosa, Wisconsin. *Id.* at 2, 73-74.

In November 2006, Immigration and Customs Enforcement Special Agent Elizabeth Hanson informed an Assistant United States Attorney in the Eastern District of Wisconsin of the results of the California investigation and inquired about the possibility of securing a warrant to search petitioner's residence. Pet. App. 2. As part of that consultation, Agent Hanson and the prosecutor reviewed the facts together, and Agent Hanson prepared a detailed affidavit in support of a warrant application. *Id.* at 2; Gov't C.A. Br. 7; see Pet. App. 65-83 (search warrant affidavit). The affidavit set forth Agent Hanson's professional experience investigating the sexual exploitation of minors, detailed three of the 11 sexually explicit images of children sent to petitioner,

stated that petitioner continued to maintain an AOL email account (TedP5785@aol.com), and provided information corroborating petitioner's address and identity. Pet. App. 2-3, 66-68, 72-74. The affidavit also noted that individuals who collect child pornography frequently use computers to obtain and retain those images, typically retain the pornographic images for years, and often keep such images in their homes. *Id.* at 2, 75-77.

On the basis of the affidavit, a magistrate judge issued a warrant to search petitioner's residence for evidence of child pornography possession. Pet. App. 24. Law enforcement agents executed the warrant the next day. *Ibid.* Petitioner spoke to the agents during the search, admitting that he had used the screen name longtalks@aol.com to trade adult pornography in chat rooms and over email. *Id.* at 3. Petitioner also stated that he had received images and videos of child pornography, but that he deleted them. *Ibid.* The agents, however, found images of child pornography on the hard drive of petitioner's computer and on a floppy disk seized during the search. *Ibid.*

2. A grand jury in the Eastern District of Wisconsin charged petitioner on two counts of possessing visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(4)(B). Indictment 1-3. Petitioner moved to suppress all of the evidence obtained as a result of the search, contending that the warrant authorizing the search was not supported by probable cause. Pet. App. 36-37.

A magistrate judge recommended that the suppression motion be granted. Pet. App. 35-56. In the magistrate judge's view, the affidavit in support of the warrant did not establish probable cause because it relied on stale information (email messages found on Golubski's

AOL account 18 months earlier) and provided an insufficient basis for inferring that petitioner was a collector of child pornography. *Id.* at 50-52. The magistrate judge declined to apply the good-faith exception to the exclusionary rule recognized in *United States* v. *Leon*, 468 U.S. 897 (1984), because in her view, "[t]he search warrant affidavit was so lacking in probable cause" that it was "entirely unreasonable" for the agents to rely on it. Pet. App. 54 (internal quotation marks omitted).

The district court adopted the magistrate judge's recommendation and granted petitioner's suppression motion. Pet. App. 21-34. Because "the government [had] concede[d] that probable cause for issuance of the warrant may have been lacking," the district court addressed only whether the good-faith exception to the exclusionary rule applied. *Id.* at 25. The court declined to apply that exception, explaining that the affidavit failed to provide information "connecting boilerplate averments about collectors of child pornography to [petitioner]." *Id.* at 27. In the district court's view, "a reasonable agent would know that the (scant) information presented in support of [the] search warrant was wholly insufficient and stale." *Id.* at 32. The court subsequently denied the government's reconsideration motion and stayed proceedings pending resolution of the government's interlocutory appeal. *Id.* at 12-13, 17.

3. The court of appeals reversed and remanded. Pet. App. 1-11. The court explained that, under this Court's decision in *Leon*, "evidence obtained in violation of the Fourth Amendment is nonetheless admissible if the officer who conducted the search acted in good faith reliance on a search warrant." *Id.* at 4. The fact that the officer obtained the warrant, the court added, "is prima facie evidence of good faith." *Ibid.* (internal quo-

tation marks omitted). The court observed that "a defendant may rebut the prima facie evidence of good faith" by establishing that "the affidavit * * * was so lacking in probable cause as to render official belief in its existence entirely unreasonable," *ibid.* (internal quotation marks omitted), but concluded that petitioner had not made such a showing here, *id.* at 5-10.

As the court explained, the affidavit recounted "that at least eleven images of child pornography had been sent to [petitioner's] email account" and that petitioner had an active AOL email account and "continued access to a computer on which child pornography could be stored." Pet. App. 5. Petitioner had argued that there was no evidence that he solicited the child pornography that was sent to him; the court replied that "an officer could reasonably believe that the number of email messages containing child pornography sent to [petitioner], and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, was sufficient to establish probable cause." *Id.* at 6. The court also rejected petitioner's contention that his change of email account suggests he did not want to continue receiving child pornography, stating that it is "much more likely" that "[petitioner] changed his email account to avoid detection," noting that petitioner "waited nearly three months after he received the first email from Golubski to change his email address" and "received numerous images of child pornography" in the meantime. *Id.* at 6-7. The court also held that the 18-month delay between the transmission of the email messages and the issuance of the search warrant did not render reliance on the search warrant unreasonable, explaining that there is no "bright line for when information is stale," *id.* at 7, and the delay here "was not so

great as to overcome the presumption of good faith," *id.* at 11. And the court stated that Agent Hanson's "consult[ation] with an Assistant United States Attorney" before seeking a warrant provided "additional evidence" of good faith. *Id.* at 5 (internal quotation marks omitted).

Finally, the court held that it was not unreasonable to believe that petitioner was a collector of child pornography and that the agent's observations about child pornography collectors applied to him. Pet. App. 8-9. The court explained that "there is no magic 'profile' of child pornography 'collectors' that must be attested to in a search warrant affidavit"; rather, "the moniker 'collector' merely recognizes that * * * because child pornography is difficult to come by, those receiving the material often keep the images for years." *Ibid.* Here, the court explained, the evidence that petitioner possessed numerous images of child pornography justified "inclusion of the child-pornography boilerplate [language]" in the search warrant affidavit. *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 13-25) that the good-faith exception to the exclusionary rule should not apply on the facts of this case. Review of that claim should be denied because the court of appeals' decision is interlocutory. Moreover, the court of appeals' fact-bound decision is correct and does not conflict with the decisions of this Court or any other court of appeals. Further review is therefore unwarranted.

1. As an initial matter, review should be denied because this case is an interlocutory posture. The court of appeals reversed the district court's order suppressing evidence and remanded the case for further proceed-

ings. The lack of any final judgment below is "a fact that of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring in denial of certiorari). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. This Court therefore routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007).

That practice promotes judicial efficiency. The case will now return to the district court, which has stayed proceedings pending resolution of the government's appeal. Pet. App. 17. If petitioner is acquitted, his claim will become moot. If petitioner is convicted, he can present all of his claims that the court of appeals rejects to this Court, following a final judgment, in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" most recent judgment).

2. Review is also unwarranted because the court of appeals' fact-bound decision applying the good-faith exception to the exclusionary rule in this case is correct

and does not conflict with the decisions of this Court or another court of appeals.

a. In *United States* v. *Leon*, 468 U.S. 897 (1984), the Court held that evidence seized pursuant to a defective search warrant may be admitted if the executing officers relied on the warrant in objective good faith. "In the ordinary case," the Court observed, executing officers "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 921. Officers can only be expected to do so in extraordinary circumstances where, for example, the "warrant [is] based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923 (internal quotation marks omitted).

The court of appeals correctly stated the established rule in *Leon*, Pet. App. 4-5, and correctly applied it to the specific facts of this case. The court observed that the warrant established petitioner's receipt of at least 11 images of child pornography over several weeks, and it concluded that "an officer could reasonably believe that the number of email messages containing child pornography sent to [petitioner], and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, was sufficient to establish probable cause." *Id.* at 5-6. The court explained that the affidavit established that petitioner had an active AOL email account and "continued access to a computer on which child pornography could be stored," *id.* at 5, and that collectors of child pornography typically retain such material for many years, *id.* at 8-9. Finally, the court noted that law enforcement officer's consultation with an Assistant United States Attorney provided additional evidence of good faith. *Id.* at 5.

Petitioner contends (Pet. 13) that the agents could not reasonably rely on the warrant because the supporting affidavit identified "no fact, act or behavior [tying petitioner] to the alleged illegal conduct." But as the court of appeals explained, this argument overlooks the most critical facts set forth in the affidavit: that petitioner was sent at least 11 images of child pornography via separate messages sent on five different dates to an email address that he maintained for weeks after the last message had been sent. Pet. App. 5; see *id.* at 83 (listing email messages). These facts strongly support the inference that petitioner was a willing recipient of the materials. *Id.* at 6. Under all of those circumstances, the court of appeals did not err in rejecting petitioner's contention that the detailed search warrant affidavit was so lacking in probable cause that it was unreasonable for agents to rely upon it.

b. Petitioner is mistaken in contending (Pet. 14-17) that the decision below conflicts with the decisions of other courts of appeals. Most of the decisions he cites address what facts are sufficient to establish probable cause that child pornography will be found on a particular computer. But the court of appeals did not address whether the warrant affidavit here established probable cause; rather, the court assumed that probable cause was lacking and asked whether the evidence obtained was nonetheless admissible under the good-faith exception set out in *Leon*. Pet. App. 4 & n.1 (court addressed only "whether a reasonable officer could believe probable cause supported the issuance of the warrant"); see *Leon*, 468 U.S. at 925 (recognizing that courts have "discretion" to pretermit "Fourth Amendment questions by turning immediately to a consideration of the officers' good faith"). Because the government did not

press—and the court of appeals did not pass on—the underlying issue of probable cause, this case presents no occasion for the Court to consider that issue. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Only three of the decisions petitioner cites address the good-faith exception, and the different outcomes in those cases are attributable to differences in the evidence, rather than any disagreement about the applicable legal rules. In *United States* v. *Rice*, 358 F.3d 1268, 1275-1276 (10th Cir. 2004), vacated on other grounds, 543 U.S. 1103 (2005)—a case similar to this one—the court of appeals held that the good-faith exception applied where the affidavit described the defendant's receipt of several sexually explicit email messages that linked the defendant to child-pornography websites. See also *United States* v. *Prideaux-Wentz*, 543 F.3d 954 (7th Cir. 2008) (applying good-faith exception where affidavit detailed that defendant uploaded numerous images of child pornography to an electronic bulletin board). By contrast, in *United States* v. *Weber*, 923 F.2d 1338, 1344-1346 (9th Cir. 1990), the court of appeals declined to apply the *Leon* exception where the warrant affidavit was based primarily on the fact that one package containing advertising for material that "apparently" was child pornography was sent to the defendant, and the defendant never received any images of child pornography. *Id.* at 1340. That situation is very unlike the situation here, where petitioner was sent numerous emails containing child pornography over a period of several weeks. And the Ninth Circuit in *Weber* stated the same legal rule used by the court of appeals here, the *Leon* good-faith exception. *Id.* at 1346. The fact that the two courts came to different conclusions on dif-

ferent facts does not evidence a conflict warranting this Court's review.

Petitioner likewise fails to identify any disagreement in the circuits regarding the legal standards for establishing probable cause to search a computer for child pornography. One of the cases petitioner cites holds that there was probable cause in facts like those here. See *United States* v. *Kelley*, 482 F.3d 1047, 1053 (9th Cir. 2007) (finding probable cause where affidavit described defendant's receipt of nine email messages containing child pornography "on multiple occasions"; "concrete evidence" that a defendant "actually solicited" illicit images was not required, so long as "it appears likely that he did from the facts averred in the affidavit and reasonable inferences drawn from them"), cert. denied, 552 U.S. 1104 (2008). In two other cases petitioner cites, the courts also found probable cause to support searches of defendants' computers, based largely on evidence that the defendants subscribed to pornographic web sites. See *United States* v. *Wagers*, 452 F.3d 534, 540 (6th Cir.), cert. denied, 549 U.S. 1032 (2006); *United States* v. *Gourde*, 440 F.3d 1065, 1070-1072 (9th Cir.) (en banc), cert. denied, 549 U.S. 1032 (2006). The remaining cases petitioner cites—*United States* v. *Stulock*, 308 F.3d 922, 925 (8th Cir. 2002), and *United States* v. *Romm*, 455 F.3d 990, 998 (9th Cir. 2006), cert. denied, 549 U.S. 1150 (2007)—do not address the question of probable cause but instead concern the distinct issue of what evidence suffices to prove knowing possession of child pornography beyond a reasonable doubt. Again, to the extent that courts have reached different outcomes on that question, they are attributable to differences in the evidence, rather than a disagreement about the applicable legal standards.

3. Petitioner contends (Pet. 18-22) that the court of appeals erred in considering, as evidence of good faith, the fact that the law enforcement agent consulted with an Assistant United States Attorney. He is mistaken. As an initial matter, the court of appeals did not hold, as petitioner suggests (Pet. 18), that "the subjective judgment of a prosecutor" may "replace[] the objective and neutral" judgment of a detached judicial officer. Rather, the court held that the search warrant affidavit was not so lacking in probable cause as to make reliance upon it unreasonable, and then stated that consulting with the prosecutor before applying for a search warrant provided "additional evidence" of good faith. Pet. App. 5 (internal quotation marks omitted).

The court's latter observation is entirely consistent with *Leon* and a companion case, *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). In *Sheppard*, this Court applied the good-faith exception based in part on the fact that "[t]he officers * * * took every step that could reasonably be expected of them," including having the search warrant affidavit prepared by the investigating detective "reviewed and approved by the District Attorney." *Id.* at 989. And in *Leon*, the Court likewise noted that the officer's "extensive application" for a search warrant "was reviewed by several Deputy District Attorneys," which was one of many factors that made "the officers' reliance on the magistrate's determination of probable cause * * * objectively reasonable." 468 U.S. at 902, 926.

As petitioner acknowledges (Pet. 21), the courts of appeals have routinely treated an officer's consultation with the prosecutor as "additional evidence of * * * objective good faith." Pet. App. 5 (quoting *United States* v. *Bynum*, 293 F.3d 192, 198 (4th Cir. 2002), and

collecting cases); see also, *e.g.*, *United States* v. *Hallam*, 407 F.3d 942, 947 (8th Cir. 2005); *United States* v. *Johnson*, 78 F.3d 1258, 1264 (8th Cir.), cert. denied, 519 U.S. 889 (1996); *United States* v. *Mendonsa*, 989 F.2d 366, 369-370 (9th Cir. 1993); *United States* v. *Brown*, 951 F.2d 999, 1005 (9th Cir. 1991); *United States* v. *Taxacher*, 902 F.2d 867, 872 (11th Cir. 1990), cert. denied, 499 U.S. 919 (1991). Petitioner identifies no disagreement in the circuits on this point. Indeed, he acknowledges that "[p]rosecutorial approval may increase an agent's subjective good faith that probable cause exists." Pet. 19 (emphasis omitted). Accordingly, the court of appeals did not err in identifying consultation with a prosecutor as additional evidence of good faith.

4. Finally, there is no merit to petitioner's contention (Pet. 22) that the court of appeals' decision creates a conflict on the question whether the inclusion of a so-called collector's profile in a warrant affidavit can contribute to a finding of probable cause. The court of appeals did not hold that an affidavit with a boilerplate profile and no connection to the defendant may establish probable cause. To the contrary: the court stated that an affidavit "must lay a foundation" to "connect[]" the defendant to child pornography, such as by showing that he "uploaded or possessed multiple pieces of child pornography." Pet. App. 8-9 (internal quotation marks omitted). That is the same point made in *Weber*, 923 F.2d at 1345, and *United States* v. *Zimmerman*, 277 F.3d 426, 433 n.4 (3d Cir. 2002), the decisions petitioner cites.* Indeed, the court of appeals itself relied upon

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* Petitioner also cites (Pet. 24) *United States* v. *Gourde*, 382 F.3d 1003, 1013 (9th Cir. 2004), but that decision was reheard en banc, and the en banc court found that the facts asserted in the affidavit established probable cause, see 440 F.3d at 1069-1074.

Weber and *Zimmerman* in *Prideaux-Wentz*, when it stated that there must be "a bridge connecting * * * general averments" such as collector profiles to the target of the search at issue. 543 F.3d at 961. Applying that principle here, the court concluded that petitioner's receipt of 11 images of child pornography over a period of several weeks provided a sufficient bridge, at least so that it was not unreasonable for agents to rely upon the warrant. Pet. App. 8-9. That fact-specific conclusion does not conflict with the decisions in *Weber* and *Zimmerman* and does not otherwise warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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